

FILED & ENTERED

JUL 30 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY bakchell DEPUTY CLERK

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

SWING HOUSE REHEARSAL AND
RECORDING, INC.; and PHILIP
JOSEPH JAURIGUI,

Debtors.

7175 WB, LLC,

Plaintiff,

vs.

LEVENE, NEALE, BENDER, YOO &
BRILL, L.L.P.,

Defendant.

Case No. 2:16-bk-24758-RK

Chapter 11

Adv. No. 2:19-ap-01088-RK

**AMENDED ORDER GRANTING MOTION
TO DISMISS FIRST AMENDED
COMPLAINT WITH PREJUDICE FOR
FAILURE TO STATE A CLAIM**

Date: July 2, 2019

Time: 2:30 p.m.

Place: Courtroom 1675
255 E. Temple Street
Los Angeles, CA 90012

On July 2, 2019 at 2:30 p.m., a hearing was held before this Court regarding the Notice of Motion and Motion to Dismiss First Amended Complaint for Failure to State a Claim ("Motion") [Doc. 31], the Honorable Robert N. Kwan, United States Bankruptcy Judge, presiding. Allen L. Michel of Michel | Miller | Park, appeared on behalf of Defendant Levene, Neale, Bender, Yoo & Brill L.L.P., Michael D. Good and Timothy L. Alger, and Plaintiff's general counsel appeared for Plaintiff 7175 WB, LLC.

1 The Court having reviewed and considered the Motion and all related pleadings,
2 Plaintiff's Opposition to the Motion [Doc. 38] and Levene, Neale, Bender, Yoo & Brill
3 L.L.P.'s Reply thereto [Doc. 42] and having considered and sustained Defendant's
4 Objections to the Declaration of Michael D. Good [Doc. 43], and the Court having posted
5 its tentative ruling on the Motion prior to the hearing, such tentative ruling having become
6 the Court's final ruling after consideration of the arguments at the hearing, and is attached
7 to this Order as Exhibit A, which ruling is incorporated in full herein by this reference, and
8 finding good cause appearing therefor,

9 IT IS HEREBY ORDERED that the Motion is granted, and the First Amended
10 Complaint is dismissed, without leave to amend.

11 IT IS FURTHER ORDERED that this adversary proceeding is dismissed with
12 prejudice.

13 This Amended Order supersedes the Order entered July 16, 2019 [Doc. 43], which
14 erroneously included the portion of the court's tentative ruling pertaining to the Defendant's
15 anti-SLAPP special motion to strike.

16 IT IS SO ORDERED.

17 ###

18
19
20
21
22
23
24 Date: July 30, 2019



Robert Kwan
United States Bankruptcy Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Robert Kwan, Presiding
Courtroom 1675 Calendar

Tuesday, July 2, 2019

Hearing Room 1675

2:30 PM

2:16-24758 Swing House Rehearsal and Recording, Inc.

Chapter 11

Adv#: 2:19-01088 7175 WB, LLC v. Levene, Neale, Bender, Yoo & Brill, L.L.P.

#15.00 Hearing re: Motion to dismiss first amended complaint pursuant to FRCP 12(b)(6) and
FRBP 7012

Docket 31

Tentative Ruling:

Revised tentative ruling as of 7/1/19 at 5:00 p.m. Grant Levene Neale's motion to dismiss 7175's first amended complaint for failure to state a claim upon which relief can be granted; deny leave to amend because amendment would be futile. See *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015); *Thinket Ink Information Resources, Inc. v Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). ~~Grant Levene Neale's anti-SLAPP motion to strike 7175's first amended complaint. Appearances are required on 7/2/19, but counsel may appear by telephone.~~

Motion to Dismiss

None of the federal statutes cited by 7175, 11 U.S.C. §§ 327, 328, 330 and 1107 and 28 U.S.C. § 959(b), provide for a private right of action for it as a creditor of the bankruptcy estate to sue Levene Neale, the attorneys for the debtor in possession, for monetary damages. The statutory language does not provide for such a private right of action.

Although there is no controlling Ninth Circuit case precedent, the better rule does not recognize that counsel for the debtor in possession owes a fiduciary duty to creditors such as 7175. *Hansen, Jones & Leta, P.C. v. Segal*, 220 B.R. 434 (D. Utah 1998); *ICM Notes, Ltd. v. Andrews & Kurth, L.L.P.*, 276 B.R. 117 (S.D. Tex. 2002); *contra, In re Count Liberty, LLC*, 370 B.R. 259 (Bankr. C.D. Cal. 2007); see also, 9 Norton, *Norton Bankruptcy Law & Practice*, Duties of DIP counsel, §172.6 (3rd ed. Online ed. April 2019 update); Feeney, Williamson and Stepan, *Bankruptcy Law Manual*, Professionals-Retention of professionals; Freeman, "Are DIP and Committee Counsel Fiduciaries for Their Clients' Constituents or the Bankruptcy Estate?"

7/1/2019 5:09:17 PM

Page 20 of 28

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Robert Kwan, Presiding
Courtroom 1675 Calendar

Tuesday, July 2, 2019

Hearing Room 1675

2:30 PM

CONT... Swing House Rehearsal and Recording, Inc.

Chapter 11

What is a Fiduciary, Anyway?," 17 American Bankruptcy Institute Law Journal 291 (2009). Fiduciary duties, § 4.20 (5th ed. Online ed. June 2019 update). Contrary authority cited by 7175, including dicta in *In re Perez*, 30 F.3d 1209, 1219 (9th Cir. 1994), although purportedly the majority position, is not as persuasive because of the dual role of the DIP and the debtor. 9 Norton, *Norton Bankruptcy Law & Practice*, Duties of DIP counsel, §172.6, citing Freeman, *supra*. The DIP is also the debtor, need not be disinterested, need not investigate the debtor's actions and may bargain for equity and seek cramdown under a plan, and individual debtors may use estate property for personal needs. *Id.* However, the DIP has fiduciary duties to creditors and the estate, and must meet fiduciary duties while balancing such duties with its own self-interests. *Id.* If the debtor/DIP is a single client with fiduciary duties, one firm can represent it. *Id.* If the estate is considered the client, the debtor client does not disappear and its interests are not always aligned with those of the estate, and a lawyer cannot represent multiple clients, even with consent, when negotiating or litigating between them. *Id.* The so-called majority view represented by *In re Count Liberty, LLC* cannot reconcile lawyer's ethical duty to avoid representing adverse interests with acting in a fiduciary capacity for both the DIP and the estate, and indirectly, creditors.

Although 7175 argues that it has standing to bring this complaint because it was assigned such a right in the confirmed plan, the assigned claims are limited to Debtor's alleged pre-confirmation concealment of potential insurance coverages and other insurance-related information. Specifically, in the confirmed Plan, the Debtor "assigns to 7175 WB any and all of the Debtor's claims against third parties . . . arising from (i) alleged pre-confirmation failures by the Debtor to obtain insurance policies compliant with the provisions of the Debtor's former lease . . . and (ii) alleged pre-confirmation failures by the Debtor to disclose potential insurance coverages for damages and losses to the Willoughby Property and to allegedly provide other insurance-related information . . .," and "policies procured by the Debtor, as Lessee, relating to the Willoughby Property . . ." 7175's assignment does not include the unlimited right to sue the Debtor's counsel for malpractice or preparation of bankruptcy schedules.

Most of the alleged conduct of Levene Neale in the first amended complaint

7/1/2019 5:09:17 PM

Page 21 of 28

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Robert Kwan, Presiding
Courtroom 1675 Calendar

Tuesday, July 2, 2019

Hearing Room 1675

2:30 PM

CONT... Swing House Rehearsal and Recording, Inc.

Chapter 11

(e.g., proposing an allegedly unconfirmable reorganization plan) is subject to the litigation privilege under California Civil Code § 47 and the federal Noerr-Pennington doctrine. However, while Levene Neale is entitled to claim the litigation privilege under California Civil Code § 47 and the federal Noerr-Pennington doctrine as to this conduct, fraud is an exception to the litigation privilege. California Civil Code § 47; *Theme Promotions, Inc. v. News America Marketing, FSI*, 546 F.3d 991, 1007 (9th Cir. 2008). *Nilsen v. Nielson (In re Cedar Funding, Inc.)*, 419 B.R. 807, 824 (9th Cir. BAP 2009). Attorneys, including Levene Neale, have an independent duty not to commit fraud and not to knowingly misrepresent facts to a third party, such as 7175, and the duty not to commit fraud would seem to be a matter of both federal and state common law. *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, 131 Cal.App.4th 802, 824-835 (2005). Thus, the only alleged conduct of Levene Neale in the complaint that would not be subject to the litigation privilege would be affirmative fraud.

However, the fraud allegations in 7175's first amended complaint (and in the original complaint) pertain *only to the alleged misrepresentations of Swing House and Jaurigui*, Debtor and its insider, not to any misrepresentations made by Levene Neale, DIP counsel. In the original complaint, 7175 alleged: "During discovery conducted in the Superior Court Action, 7175 WB propounded Form Interrogatories on Swing House . . . [and] Swing House's response to this Form Interrogatory was 'No.'" ECF 1 at 3, ¶ 15. It also made allegations about "*Swing House's* Post-Petition Misrepresentations Regarding The Existence Of Insurance." *Id.* at 4-5, ¶¶ 21-22 (emphasis added). Nowhere in the original complaint are there allegations about *Levene Neale's* alleged fraud. In the first amended complaint, after amending its original complaint in response to a motion to dismiss, 7175 reiterates its allegations that *Swing House* made misrepresentations regarding insurance policies, but these statements were not made by Levene Neale. Specifically, 7175 in the first amended complaint alleges that "Defendant, *in preparing Swing House's bankruptcy schedules*, had not disclosed the existence of any insurance" ECF 23 at 5, ¶ 27. This allegation cannot form the basis of a misrepresentation *by Levene Neale* because bankruptcy schedules were verified under penalty of perjury by Debtor's insider, its president and

7/1/2019 5:09:17 PM

Page 22 of 28

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Robert Kwan, Presiding
Courtroom 1675 Calendar

Tuesday, July 2, 2019

Hearing Room 1675

2:30 PM

CONT... Swing House Rehearsal and Recording, Inc.

Chapter 11

secretary, Philip Jaurigui, not Levene Neale. Similarly, in the first amended complaint, 7175 attempts to impute statements made by Jaurigui onto Levene Neale. 7175 alleges that "Defendant stated . . . Mr. Jaurigui replied under oath that there was and is no insurance available to cover [Plaintiff]'s claims," *id.* at 7, ¶ 28, but then immediately thereafter says it was *Levene Neale* that made this statement: "At the time Defendant made such representations, Defendant knew or should have known that such sworn statement, i.e., that 'there was and is no insurance available to cover [Plaintiff]'s claims,' was false," *id.* at 7, ¶ 29. Like the allegation in ¶ 27 of the first amended complaint, this allegation cannot form the basis of a misrepresentation by *Levene Neale* because Levene Neale was not stating that there was no insurance available; rather, Levene Neale was stating that *Jaurigui* testified that there was no insurance available. Such allegations cannot form the basis of fraud that would constitute an exception to the litigation privilege.

Thus, the court is inclined to grant Levene Neale's motion to dismiss 7175's first amended complaint for failure to state a claim upon which relief can be granted and to deny leave to amend because amendment would be futile. See *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015); *Thinket Ink Information Resources, Inc. v Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

Special Motion to Strike

~~Even though the court will grant Levene Neale's motion to dismiss the first amended complaint, Levene Neale's anti-SLAPP motion to strike is not moot because a defendant prevailing on an anti-SLAPP motion is entitled to attorneys' fees. California Code of Civil Procedure § 425.16(c); *White v. Lieberman*, 103 Cal. App. 4th 210, 220 (2002).~~

~~The first prong, making a prima facie showing that the SLAPP suit arises from the defendant's right of petition, is satisfied since the first amended complaint is based on Levene Neale's statements and conduct as general bankruptcy counsel to the debtor in possession in the underlying bankruptcy case before this court. The burden then shifts to 7175 as the SLAPP plaintiff, 7175, to demonstrate it has a probability of prevailing on the claim. As discussed above, 7175 has not alleged a cause of action that would provide it the~~

7/1/2019 5:09:17 PM

Page 23 of 28